Supreme Court, U.S.
FILED

05-454 OCT 5 - 2005

OFFICE OF THE CLERK

No. 05-___

IN THE

Supreme Court of the United States

William A. Cox,

Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Clifford J. Barnard
ATTORNEY AT LAW
1790 30th Street, Suite 280
Boulder, CO 80301

Thomas C. Goldstein
Amy Howe
(Counsel of Record)
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

October 5, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Should this Court resolve the three-way conflict among seven circuits over whether a federal judge can require a defendant to serve a term of imprisonment consecutively to another sentence that has not yet been imposed?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW AND JURISDICTION 1
RELEVANT STATUTORY PROVISION 1
STATEMENT 1
REASONS FOR GRANTING THE WRIT 5
I. The Circuits Are Irreconcilably Divided Over the Construction of 18 U.S.C. 3584(a). 6
II. Review By This Court Is Particularly Warranted Because the Conflict Over the Proper Construction of Section 3584(a) Creates Serious Inequities in the Treatment of Similarly Situated Defendants. 10
III. The Decision Below Is Erroneous. 14
IV. Petitioner's Case Is an Ideal Vehicle to Decide the Question Presented. 24
CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Abdul-Malik v. *Hawk-Sawyer*, 403 F.3d 72 (CA2 2005) . 6, 19
Duncan v. *Walker*, 533 U.S. 167 (2001) 17
Gregory v. *Ashcroft*, 501 U.S. 452 (1991)..... 17
Griffin v. *Pennsylvania Dep't of Corr.*, 862 A.2d 152
(Pa. Commw. Ct. 2004) 19
Jones v. *Winn*, 13 Fed. Appx. 419 (CA7 Jun. 29, 2001)
(unpublished) 9
Luther v. *Vanyur*, 14 F. Supp. 2d 773 (E.D.N.C. 1997)..... 16
McCarthy v. *Doe*, 146 F.3d 118 (CA2 1998)..... 6, 21, 22
McConnell v. *Federal Election Comm'n*,
540 U.S. 93 (2003)..... 18, 20
Olmstead v. *L.C.*, 527 U.S. 581 (1999) 25
Oquendo v. *Quinones*, 738 N.Y.S.2d 398
(N.Y. App. Div. 2002)..... 21
Pennsylvania Dep't of Corr. v. *Yeskey*,
524 U.S. 206 (1998)..... 17
People v. *Flower*, 644 P.2d 64 (Colo. Ct. App. 1982) 20
People v. *Lister*, 202 Cal. Rptr. 37 (Ct. App. 1984)..... 20
Ponzi v. *Fessenden*, 258 U.S. 254 (1922)..... 13
Romandine v. *United States*, 206 F.3d 731
(CA7 2000) 7, 9, 20
Salley v. *United States*, 786 F.2d 546 (CA2 1986)..... 6, 21, 22
Santobello v. *New York*, 404 U.S. 257 (1971)..... 13
Scheidler v. *Nat'l Org. Women*, 537 U.S. 393 (2003)..... 20
State v. *Alexander*, 162 Ohio App. 3d 333 (2005) 21
State v. *Blevins*, 394 N.W.2d 663 (Neb. 1986)..... 25
Tinsley v. *United States*, No. 95-5564, 1997
U.S. App. LEXIS 2688 (CA6 Feb. 12, 1997)..... 10
United States v. *Andrews*, 330 F.3d 1305 (CA11),
cert. denied, 540 U.S. 1003 (2003)..... passim
United States v. *Ballard*, 6 F.3d 1502 (CA11 1993) 9
United States v. *Brown*, 920 F.2d 1212 (CA5 1991)..... 8, 9
United States v. *Clayton*, 927 F.2d 491 (CA9 1991)..... passim

United States v. *Floyd*, 80 Fed. Appx. 87 (CA10 Oct. 30, 2003) (unpublished) 9
United States v. *Fuentes*, 107 F.3d 1515 (CA11 1997) 24
United States v. *Hernandez*, 234 F.3d 252 (CA5 2000) (per curiam) 7, 16
United States v. *Mayotte*, 249 F.3d 797 (CA8 2001) ... 8, 9, 18
United States v. *McDaniel*, 338 F.3d 1287 (CA11 2003) 9
United States v. *Neely*, 38 F.3d 458 (CA9 1994) (per curiam) 10
United States v. *Quintero*, 157 F.3d 1038 (CA6 1998) . passim
United States v. *Randolph*, 80 Fed. Appx. 190 (CA3 Oct. 20, 2003) (unpublished) 7
United States v. *Segal*, 549 F.2d 1293 (CA9 1977) 23
United States v. *Smith*, 101 F. Supp. 2d 332 (W.D. Pa. 2000) 16
United States v. *Stewart*, 71 Fed. Appx. 590 (CA7 Jul. 30, 2003) (unpublished) 9
United States v. *Sumlin*, 317 F.3d 780 (CA8 2003) 7, 9
United States v. *Williams*, 46 F.3d 57 (CA10 1995) 4, 7, 14
United States v. *Wilson*, 503 U.S. 329 (1992) 19
Younger v. *Harris*, 401 U.S. 37 (1971) 23

Statutes

18 U.S.C. 3584(a) ..... passim
28 U.S.C. 1254(1) 1

Other Authorities

BOP Program Statement 5160.05 ..... 8, 11
BOP Program Statement 5880.28 ..... 8, 11
C.J.S. *CRIMLAW* § 1524 (2005) 21
James J. Sample, Note, *The Sentences That Bind (The States)*, 103 COLUM. L. REV. 969 (2003) 17, 20
Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2002*, BUREAU OF JUSTICE STATISTICS BULLETIN (Dec. 2004) 13

Pet. for Cert., *Andrews* v. *United States* (No. 03-136) 12
S. Rep. No. 98-225 (1983), reprinted in 1984 U.S.C.C.A.N 3182 ..... 22, 23, 24
U.S. BIO, *Andrews* v. *United States* (No. 03-136) .. 11, 14, 24, 25
U.S. Sentencing Comm'n, *Guilty Pleas and Trial Rates, 1999 – 2003*, DATAFILES, USSCFY99 – USSCFY03.... 13

PETITION FOR A WRIT OF CERTIORARI

Petitioner William Allen Cox respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a-2a) and the district court's order (Pet. App. 3a-11a) sentencing petitioner are unpublished. The court of appeals issued its opinion on April 21, 2005 and denied rehearing and rehearing en banc on June 7, 2005. Pet. App. 12a. On August 24, 2005, Justice Breyer extended the time to file this petition to and including October 5, 2005. App. No. 05A191. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

18 U.S.C. 3584(a) provides:

> If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

STATEMENT

This case presents a fundamental and recurring question of federal law regarding criminal sentencing, one with serious implications for the uniform administration of justice,

federalism, and the separation of powers. Judges frequently confront the question whether defendants should be required to serve multiple terms of imprisonment consecutively or concurrently. Congress has authorized federal district judges to specify whether their sentences will be consecutive or concurrent in two circumstances: when multiple sentences are imposed "at the same time" or when the defendant at the time of sentencing is "*already subject to* an undischarged term of imprisonment." 18 U.S.C. 3584(a) ("Section 3584(a)") (emphasis added).

Section 3584(a) does not, however, authorize a federal district judge to order that a criminal sentence being imposed must be served concurrently or consecutively to a sentence that has not yet been imposed (hereinafter, "an unimposed sentence"). Thus, nothing in Section 3584(a) gives a federal district court the power to override the considered judgment of another court – including a state court – imposing a later sentence to make its sentence concurrent or consecutive to the prior federal sentence. Reading Section 3584(a) to limit a judge's control over whether sentences should be served concurrently with or consecutively to only those sentences existing at the time he or she acts is most consistent with the plain language of the statute, better respects the legitimate interests of other sovereigns in structuring sentences, and avoids serious separation of powers problems.

Despite the plain language of Section 3584(a), the district court in this case ordered that petitioner's sentence be served consecutively to *any* terms of imprisonment imposed later. Sentencing Hr'g Tr. 26. In other words, the district judge purported to issue an order prohibiting *all* later sentencing courts from determining, based on the facts before them, that concurrent service would be more appropriate.

In affirming that order, the Tenth Circuit acknowledged that the issue before it was the subject of an entrenched circuit conflict. Pet. App. 1a-2a (collecting cases). To date, seven courts of appeals have adopted three different rules. Four

circuits (including the Tenth Circuit in this case) empower the first judge to control a later judge's sentence. One circuit holds that district courts lack this power, and instead confides to the Attorney General the power to decide whether sentences will be served concurrently or consecutively. Two other circuits hold categorically that a district court may not impose a sentence consecutive to an unimposed term of imprisonment. These courts recognize that the plain language of the statute, common sense, the interests of comity and separation of powers, and the legislative history all confirm that a district judge may not control later sentencing.

Because only this Court can bring the required uniformity to federal sentencing, and because the decision below is erroneous, certiorari should be granted.

1. This case involves two separate crimes committed by petitioner William Allen Cox. The first crime involved a violation of Colorado law: in the winter of 2003, petitioner killed Gene Watson during a drug-related dispute. U.S. C.A. Br. 14-15. The second crime involved a federal charge: petitioner participated in the armed robbery of a Colorado gun store. *Id.* 4-6.

Petitioner pleaded guilty to both charges. Both courts were aware of the pending charges in the other court. Petitioner's plea bargain with the Colorado state authorities specified that he would plead guilty to second-degree murder in return for a forty-eight-year sentence to be served concurrently with any federally imposed sentence. Petr. C.A. Br 3. The presentence investigation report prepared by the federal probation officer, by contrast, recommended that petitioner's federal sentence run consecutively to the contemplated state sentence. *Id.* 4.

When it was notified of the federal government's intent to seek a consecutive sentence, the state trial court acted to ensure that it would be able to take the federal sentence into account by vacating the forty-eight-year sentence it had

previously imposed and awaiting the imposition of the federal sentence before acting. U.S. C.A. Br. 18-19.

Upon learning that there was now no already-imposed state sentence, the federal district court rescheduled petitioner's federal sentencing and ordered briefing on the question "whether the sentence of this court may or must be imposed consecutively in whole or in part to the sentence to be imposed in the aforementioned state court matter." Petr. C.A. Br. 4.

At the September 1, 2004 sentencing hearing, the district court decried the "extraordinary" efforts taken by the state court to conform to the terms of petitioner's state plea agreement. Sentencing Hr'g Tr. 16. It then imposed an aggregate sentence of 168 months, to be served consecutively "to *any sentence yet to be imposed* in state court, including Denver County District Court, Colorado, Case Number 2003CR2984." Pet. App. 5a (emphasis added).

Because the state was committed to ensuring concurrent service, on March 18, 2005, it took the extraordinary step of releasing petitioner on a personal recognizance bond. Denver County Dist. Ct., Case No. 2003 CR 2984, Minute Order (Mar. 18, 2005). Petitioner is currently in federal custody in a federal prison serving his 168-month federal sentence. Petitioner still has not been sentenced on the pending state charge.

2. On appeal, petitioner challenged only the district court's authority to require that its sentence be served consecutively to an unimposed state sentence. The court of appeals affirmed. The court acknowledged the circuit split regarding the question presented but deemed itself bound by its prior ruling in *United States* v. *Williams*, 46 F.3d 57, cert. denied, 516 U.S. 826 (1995), that such a sentence is permissible. Pet. App. 2a. The court thus agreed with petitioner that it could "do nothing for him." *Ibid.*

3. The Tenth Circuit denied rehearing and rehearing en banc. Pet. App. 12a. This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents an important question of federal law on which the circuits are avowedly intractably divided. Congress has provided by statute that district courts control whether a sentence they impose is to be served concurrently or consecutively in only two particular circumstances: "[i]f multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." 18 U.S.C. 3584(a). There is a longstanding, widely recognized, and deeply entrenched three-way conflict among seven circuits over whether, despite this plain language, a federal district court may nonetheless also require that a sentence it imposes run consecutively to another sentence that has not yet been imposed. This question recurs frequently because a significant number of defendants are sentenced in federal court while criminal charges are also pending in another state or federal court. Four courts of appeals – including the Tenth Circuit in this case – have construed Section 3584(a) to permit a district court to order that its sentence be served consecutively to an as-yet-unimposed sentence. Several other circuits squarely reject that interpretation as contrary not only to the plain meaning of the statute, but also to the principles of federalism, separation of powers, and the uniform administration of justice. Although this Court declined several years ago to grant certiorari on the question presented, see *Andrews* v. *United States*, 330 F.3d 1305 (CA11), cert. denied, 540 U.S. 1003 (2003), this case is a better vehicle for this Court's review than *Andrews*. See *infra* at 24-25. Because only this Court can bring the required uniformity to federal sentencing, and because the decision below is erroneous, certiorari should be granted.

I. The Circuits Are Irreconcilably Divided Over the Construction of 18 U.S.C. 3584(a).

1. In the Sixth and Ninth Circuits, the sentence imposed on petitioner by the district court would have been invalid. These circuits hold that federal district courts do not possess the remarkable power to order that their sentences run consecutively to an as-yet non-existent sentence. *United States* v. *Quintero*, 157 F.3d 1038, 1039-40 (CA6 1998); *United States* v. *Clayton*, 927 F.2d 491, 492 (CA9 1991). Moreover, although the Second Circuit has not directly addressed the question, it has strongly suggested that it agrees.[1]

But petitioner was sentenced in the Tenth Circuit, which – along with the Fifth, Eighth, and Eleventh Circuits – holds that a federal judge may, in effect, bind a future judge by ordering a sentence to run consecutively to an unimposed state or federal sentence. See Pet. App. 1a-2a; *United States*

---

[1] Although the Second Circuit had interpreted a predecessor to Section 3584(a) as granting federal courts authority to order a sentence to run consecutively to an unimposed state sentence, see *Salley* v. *United States*, 786 F.2d 546, 547-48 (CA2 1986), that court has more recently held (in square conflict with the Seventh Circuit, see *infra* at 7-8) that Section 3584(a) does not establish a default rule that a federal sentence will run consecutively to an unimposed state sentence when the federal sentencing judge is silent. See *Abdul-Malik* v. *Hawk-Sawyer*, 403 F.3d 72, 75 (CA2 2005) ("the absence of any specification by the federal court as to whether its sentence should run concurrently or consecutively does not signify intent that the sentences run consecutively because the federal court may not even know that another sentence is about to be imposed"); *McCarthy* v. *Doe*, 146 F.3d 118, 122 (CA2 1998) ("there is no basis to infer any intention as to consecutive or concurrent service from the [federal] sentencing judge's silence, which could equally well indicate either that the judge did not know another sentence would be imposed, or did not know what the future [state] sentence would be").

v. *Andrews*, 330 F.3d 1305, 1307 (CA11), cert. denied, 540 U.S. 1003 (2003); *United States* v. *Sumlin*, 317 F.3d 780, 782 (CA8 2003); *United States* v. *Hernandez*, 234 F.3d 252, 256 (CA5 2000) (per curiam). These courts rely on the final provision of Section 3584(a), which provides that "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." These courts reason that this sentence's reference to terms "imposed at different times" encompasses even those situations in which the later sentence has not yet been imposed. See, *e.g.*, *Williams*, 46 F.3d at 59. Moreover, those courts emphasize that they "find no language in section 3584(a) prohibiting a district court from ordering that a federal sentence be served consecutively to a state sentence that has not yet been imposed." *Id.*

The Seventh Circuit has rejected both these constructions of Section 3584(a). See *Romandine* v. *United States*, 206 F.3d 731 (CA7 2000). While agreeing with the Sixth and Ninth Circuits that (contrary to the ruling below) Section 3584(a) does not authorize federal courts to order that a sentence run consecutively to an unimposed sentence, the Seventh Circuit nonetheless holds that the final sentence of Section 3584(a) requires that *all* sentences imposed while other charges are pending be consecutive by default. *Id.* at 737-38. Because the district court has no power to express a view on how the sentence should be structured, the Attorney General (acting through the Bureau of Prisons ("BOP")) thus has the "effective last word" to decide whether the sentence will be served consecutively or concurrently under Section 3584(a). *Id.* at 738.[2] Of note, even the BOP rejects the

---

[2] In an unpublished opinion, the Third Circuit has indicated that it agrees with the Seventh Circuit's reasoning in *Romandine*. See *United States* v. *Randolph*, 80 Fed. Appx. 190, 196 (CA3 Oct. 20, 2003) (unpublished) ("a defendant in Randolph's position must serve his state and federal terms of imprisonment consecutively unless he can convince the Bureau of Prisons to designate the state

Seventh Circuit's view and will give effect to a district court's order. See BOP Program Statement 5160.05 ¶ 9(b)(4)(f); BOP Program Statement 5880.28, at 1-32A.

2. This Court's intervention is required because the circuit split is entrenched. The conflict among the circuits has existed at least since 1991, compare *United States* v. *Clayton*, 927 F.2d 491, 492 (CA9 1991) (holding that Section 3584(a) does not grant federal courts authority to order sentences be served consecutively to unimposed sentences) with *United States* v. *Brown*, 920 F.2d 1212, 1217 (CA5 1991) (holding that Section 3584(a) does grant this authority), and is only growing even broader and more entrenched with time. For example, in *Quintero*, the Sixth Circuit expressly acknowledged the divergent views of the circuits adhering to the majority rule but nonetheless declined to follow those courts, reasoning that its construction of the statute was most consistent with the text and legislative history of the statute. See 157 F.3d at 1040. By contrast, in *United States* v. *Mayotte*, 249 F.3d 797, 799 (2001), the Eighth Circuit acknowledged not only the circuit split but also the "concerns discussed by the circuits holding the minority view" – namely, that conferring power on a federal court to control how a later-imposed state sentence is served undermines principles of comity and that conferring that power on the Attorney General raises separation-of-powers problems. Nonetheless, the Eighth Circuit was "persuaded to adopt the majority view."

This Court's intervention to bring uniformity to federal law is also necessary because reconsideration at the circuit level is unlikely: not only did the Tenth Circuit in this case decline an opportunity to reconsider this issue en banc, Pet. App. 12a, but at least five circuits now regard their prior holdings as sufficiently settled that they simply cite their prior

---

prison as 'the official detention facility at which the sentence is to be served'").

holdings without further elaboration. See, *e.g.*, Pet. App. 2a; *Andrews*, 330 F.3d at 1307 ("we cannot ignore *Ballard*'s clear holding that a court does have authority to impose a consecutive sentence to an unimposed, future sentence"); *Sumlin*, 317 F.3d at 782 (deeming the holding in *Mayotte* "dispositive" of the question whether district courts have authority to require that sentence run consecutively to unimposed sentence); *United States* v. *Hernandez*, 234 F.3d at 256 ("under our precedent, the district court may order that a federal sentence run concurrent with a forthcoming state sentence"); *United States* v. *Stewart*, 71 Fed. Appx. 590, 592 (CA7 Jul. 30, 2003) (unpublished) (relying, without any additional discussion, on *Romandine*).

Finally, this Court's intervention is further warranted because the question presented is frequently recurring. The question whether a federal court may order its sentence to run consecutively to an as-yet-unimposed sentence can arise any time a federal defendant is sentenced while other charges are pending against him. Indeed, the issue recurs so frequently that seven circuits have decided the question presented, and the issue continues to arise not only on direct appeal,[3] but also in federal post-conviction proceedings.[4]

---

[3] See, *e.g.*, *Andrews*, 330 F.3d 1305; *United States* v. *Floyd*, 80 Fed. Appx. 87 (CA10 Oct. 30, 2003) (unpublished) (following Tenth Circuit precedent in *Williams*); *United States* v. *McDaniel*, 338 F.3d 1287 (CA11 2003) (following Eleventh Circuit precedent in *Andrews*); *Stewart*, 71 Fed. Appx. 590 (following Seventh Circuit precedent in *Romandine*); *Sumlin*, 317 F.3d 780; *Mayotte*, 249 F.3d 797; *Quintero*, 157 F.3d 1038; *United States* v. *Ballard*, 6 F.3d 1502 (CA11 1993); *United States* v. *Brown*, 920 F.2d 1212 (CA5 1991); *Clayton*, 927 F.2d 491.

[4] See, *e.g.*, *Brown* v. *Ashcroft*, 41 Fed. Appx. 873 (CA7 June 21, 2002) (unpublished) (following Seventh Circuit precedent in *Romandine*, holding that BOP has sole discretion to make sentences run concurrently when federal court was silent and state court ordered concurrent sentences); *Jones* v. *Winn*, 13 Fed. Appx. 419 (CA7 Jun. 29, 2001) (unpublished) (same); *Hernandez*, 234 F.3d

II. Review By This Court Is Particularly Warranted Because the Conflict Over the Proper Construction of Section 3584(a) Creates Serious Inequities in the Treatment of Similarly Situated Defendants.

1. The circuit split over the proper construction of Section 3584(a) is particularly untenable given the numerous ways in which it results in similarly situated defendants being treated differently.

In this case, petitioner's state and federal sentences both involved events that occurred in Colorado. If, however, petitioner had instead robbed a gun store in Nevada, the federal district court could not, under the Ninth Circuit's rule, have imposed a consecutive sentence on him. Thus, under the Tenth Circuit's rule, petitioner will spend fourteen more years in prison than a prisoner who was sentenced by the Colorado state courts to precisely the same term of imprisonment but was indicted and tried on federal charges in Nevada.

The BOP also treats prisoners differently based on the sentencing circuit. If a prisoner enters the federal system from the Fifth, Eighth, Tenth, or Eleventh Circuits, which permit federal courts to require that their sentences be served

---

252 (holding that petitioner did not have to be warned, to make guilty plea valid, that federal sentence could run consecutively to unimposed state sentence because federal court had discretion, and thus consecutive sentence was not a necessary consequence of Section 3584(a)'s application); *Romandine*, 206 F.3d 731; *Tinsley* v. *United States*, No. 95-5564, 1997 U.S. App. LEXIS 2688, at *11 (CA6 Feb. 12, 1997) (unpublished) (denying habeas when petitioner claimed that federal court's order that sentence run consecutively to unimposed state sentence violated due process rights, but recognizing "the problems associated with the sentencing practice employed by the district court"); *United States* v. *Neely*, 38 F.3d 458 (CA9 1994) (per curiam) (holding that a district court, to make guilty plea valid, must inform a federal defendant against whom state charges are pending that a federal court lacks authority to impose a sentence to be served concurrently with a state sentence).

consecutively to after-imposed sentences, the BOP will not accept custody of a prisoner until his full state sentence has been served, no matter what the state court decides. See BOP Program Statement 5160.05 ¶ 9(b)(4)(f) ("The Bureau will not allow a concurrent designation if the sentencing court has already made a determination regarding the order of service of sentence (e.g., the federal sentencing court ordered the sentence to run consecutively to any other)"); BOP Program Statement 5880.28, at 1-32a ("On occasion, a federal court will order the federal sentence to run concurrently with or consecutively to a not yet imposed term of imprisonment. Case law supports a court's discretion to enter such an order and the federal sentence shall be enforced in the manner prescribed by the court."). In the Seventh Circuit, the decision whether to give effect to the state sentence would have belonged to the BOP alone.

Defendants are regularly sentenced within the jurisdiction of one geographic circuit but imprisoned in another, requiring the government to apply conflicting rules to prisoners within the jurisdiction of a single regional office of the BOP and even within the same correctional institution. Similarly, prisoners are in some instances simultaneously subject to an initial federal sentence and a sentence later imposed by a state or federal court located within the geographic confines of another circuit, possibly one with a different rule. See, *e.g.*, *Cozine* v. *Crabtree*, 15 F. Supp. 2d 997 (D. Or. 1998) (holding that federal sentence imposed within Fifth Circuit cannot be consecutive to sentence later imposed by California because Ninth Circuit rejects Fifth Circuit's reading of Section 3584(a)).

2. The Solicitor General has previously argued that the circuit split is tolerable because the second sentencing court can always circumvent a prior sentencing court's directive that its sentence be served consecutively by artificially reducing the second sentence by the length of the earlier imposed federal sentence. See U.S. BIO 13-14, *Andrews* v. *United States* (No. 03-136). Leaving aside the fact that this

gambit requires a certain amount of disingenuousness by the second court, it will often be unavailing. For example, a state court's sentencing discretion may be eliminated altogether by mandatory minimum sentences, which cannot be adjusted to account for the previously imposed federal sentence. See, *e.g.*, Pet. for Cert. 11, *Andrews* v. *United States* (No. 03-136) (involving state drug charge carrying a three-year minimum sentence, pursuant to which state court could not depart downward to circumvent the federal court's order of consecutive sentences). And when the subsequent sentence is imposed by a federal court, rather than a state court, the second federal court will be powerless to overcome the designation of the previous federal sentence as consecutive. Indeed, that the conflict is outcome determinative in successive federal sentencing is itself sufficient to warrant certiorari.

In any event, the prospect that, in a small subset of cases, a state judge might seek to circumvent the designation of a federal sentence as consecutive heightens, rather than reduces, the importance of the question presented. A rule leaving a state court with no option other than to artificially reduce a valid state sentence, for the sole purpose of counteracting a federal court's insistence that its sentence take precedence over any other subsequently imposed sentence, is an affront to federal-state comity and, in particular, the states' sovereign authority to implement their own criminal laws.

Petitioner's case exemplifies the extent to which the unpalatable choices created by the majority rule constitute an affront to comity and state sovereignty. In petitioner's case, the state concluded that a plea bargain, pursuant to which petitioner would serve forty-eight years concurrently with his federal sentence, was the appropriate punishment for his state law offense. That plea bargain necessarily took into account factors such as the seriousness of the crime with which petitioner was charged, evidentiary difficulties the State would have faced at trial, the workload of the court and prosecutors, and the defendant's contrition. See, *e.g.*, Tr. 18;

U.S. C.A. Br. 18 n.10. In light of the "essential" and "highly desirable" role of plea bargaining in our justice system,[5] *Santobello* v. *New York*, 404 U.S. 257, 261 (1971), the district court's determination to override the state's plea agreement in this case perfectly illustrates the extent to which the majority rule offends against federal-state comity.[6]

If a later state court determines that a concurrent sentence is most appropriate, the Tenth Circuit's rule leaves that court with only two unattractive options: it can artificially reduce a valid state term of imprisonment or, alternatively, release the prisoner altogether, thereby forcing the federal system to take custody and start his sentence running. This effectively pits the BOP in a battle of wills with the state courts over ultimate control of sentencing that Congress could not have intended. Cf. *Cozine* v. *Crabtree*, 15 F. Supp. 2d 997, 1013 (D. Or. 1998) ("Federal officials' recalcitrance in honoring California concurrent sentences has been a continuing source of conflict for decades * * *."). This battle of wills is exactly what resulted in this case, a far cry from the "spirit of reciprocal comity and mutual assistance" that this Court has long advocated. *Ponzi* v. *Fessenden*, 258 U.S. 254, 259 (1922). In this case, for example, the state wished to ensure that petitioner's sentence could be served concurrently rather than consecutively. The state thus deemed it necessary to take the

---

[5] In 2003, plea bargains accounted for 95.7% of all federal sentences and a similar ratio of state sentences. U.S. Sentencing Comm'n, *Guilty Pleas and Trial Rates, 1999 – 2003*, DATAFILES, USSCFY99 – USSCFY03, at www.ussc.gov/ANNRPT/2003/Fig-c.pdf; Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2002*, BUREAU OF JUSTICE STATISTICS BULLETIN, at 8 (Dec. 2004), at http://www.ojp.usdoj.gov/bjs/abstract/fssc02.htm.

[6] By precluding states such as Colorado from offering concurrent sentences as part of a plea bargain, the majority rule also effectively limits the bargaining chips available to state prosecutors, making it more likely that a case will proceed to trial and thereby require the state to expend significant resources.

drastic move of releasing petitioner on a personal recognizance bond, thereby requiring federal officials to hold him in federal custody. Denver County Dist. Ct., Case No. 2003 CR 2984, Minute Order (Mar. 18, 2005).

In any event, given the extraordinary measures required to prevent a federal court from controlling the sentencing process, it is not surprising that such efforts are rarely employed – indeed, petitioner has been able to identify only one case in which the later state sentencing court successfully circumvented the designation of a federal sentence as consecutive to an unimposed term of imprisonment. See *Williams*, 46 F.3d at 57 (describing state court's sentencing reduction).

Even when a state court may theoretically be in a position to implement its conclusion that a concurrent sentence is more appropriate by reducing the subsequent sentence, such an adjustment is – contrary to the suggestion of the United States, see *Andrews* BIO 13 – itself far from simple. To ensure that a consecutive sentence is equivalent to the concurrent sentence that it would have preferred to impose, the state court cannot merely reduce the state sentence by the length of the federal sentence. Instead, it must also factor myriad considerations – such as good and earned time credits, the nature of the offenses at issue, and discrepancies between the federal and state sentencing schemes – into a complicated calculus to arrive at an equivalent sentence. Moreover, if a state court determines to reduce its sentence to ensure concurrent sentencing, it runs the risk that the federal sentence may be reduced or eliminated altogether in some subsequent proceeding, thereby resulting in a prisoner's serving a shorter sentence than the state had determined to be appropriate – here, for example, the forty-eight-year sentence stipulated to in petitioner's plea agreement.

III. The Decision Below Is Erroneous.

1. Certiorari is also warranted because the Tenth Circuit's reading of Section 3584(a) – allowing the first

sentencing court to control the sentencing decision in a subsequent proceeding – is incorrect.

As the Sixth and Ninth Circuits have recognized, Section 3584(a) has a simple structure. It is composed of three sentences. The first sentence enumerates the two specific situations in which a federal district court can control whether sentences are served concurrently or consecutively: first, when the sentencing court is imposing *both* sentences – that is, when it "imposes multiple terms of imprisonment on the defendant at the same time"; and second, when the sentencing court is imposing a sentence on a defendant who has already been sentenced by another court – that is, when the court "imposes a sentence on a defendant who is '*already subject* to an undischarged term of imprisonment.'" *Quintero*, 157 F.3d at 1040 (emphasis supplied by court). The final two sentences of the statute establish the default rules for each of these two situations. The penultimate sentence of the statute deals with the first situation – when the sentencing court itself is imposing all the sentences. When the sentencing court is imposing all the sentences, the terms are to run concurrently unless the court specifies otherwise. The last sentence of the statute deals with the second situation – when the sentencing court is sentencing a defendant who has already been sentenced elsewhere. In this situation, the sentences are to run consecutively unless the second sentencing court specifies otherwise.

Nothing in the text of Section 3584(a) gives any power to a federal district court to control the relationship between a sentence it imposes and sentences by other courts that have not yet been imposed. As the Sixth Circuit explained in *Quintero*, 157 F.3d at 1040, "[t]he opening sentence of § 3584(a) establishes [when] this statute applies * * *. The presumptions established by the last two sentences of § 3584(a) must be read in light of this limiting language at the beginning of the section." And in particular, and contrary to the circuits adopting the majority position, nothing in the text of the statute provides any indication that it was intended to

bind state court judges in subsequent proceedings. See *Luther* v. *Vanyur*, 14 F. Supp. 2d 773, 776 (E.D.N.C. 1997) ("Conspicuously absent is any discussion of the effect of the statute where there is a subsequent state sentence. This is not surprising. The statute directs the actions of federal officials, not the actions of state officials."); see also *Clayton*, 927 F.2d at 493 ("Based upon * * * the limited authority conferred by section 3584(a) * * * we hold that a federal district court does not have the authority to direct that a federal sentence be served consecutive to a state sentence not yet imposed."); *United States* v. *Smith*, 101 F. Supp. 2d 332, 343 (W.D. Pa. 2000) ("By [its] plain terms, [Section 3584(a)] appl[ies] where a defendant is already subject to a prior undischarged term of imprisonment, and do[es] not appear to embrace the situation where a defendant is simply incarcerated in a state facility while awaiting trial on state charges."). Even the Fifth Circuit, which applies the contrary rule, conceded that the Sixth and Ninth Circuits' reading is supported by the text's "plain language." *Hernandez*, 234 F.3d at 256.

The circuits that have adopted the contrary rule read the final sentence of Section 3584(a) – providing that "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently" – as if it were freestanding. But even that reading actually supports the rule adopted by the Sixth and Ninth Circuits. If the final sentence is untethered from the prior sentences, which make clear that Section 3584(a) addresses two, and only two, situations – namely, when the sentencing court is imposing the relevant sentences simultaneously and when the sentencing court is imposing the relevant sentence on a defendant already sentenced in a prior proceeding – then the circuits taking the majority position have offered no reason why a judge imposing a subsequent sentence cannot simply override the first sentencing judge's directive. After all, that judge, too, can "orde[r] that the terms are to run concurrently."

2. The Sixth and Ninth Circuit's view not only better accords with the plain language of Section 3584(a), but also avoids rendering any of its language superfluous. This Court has repeatedly directed that courts should construe statutes so that "if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (quoting *Market Co.* v. *Hoffman*, 101 U.S. 112, 115 (1879)). If the last sentence of the statute were an independent grant of authority to impose consecutive sentences in all cases in which two sentences are imposed at different times, then the first sentence would serve no purpose – it would be subsumed by the last. James J. Sample, Note, *The Sentences That Bind (The States)*, 103 COLUM. L. REV. 969, 984 (2003). In particular, it would render the "already subject to" language of the first sentence mere surplusage.

3. The majority position also violates canons of statutory construction designed to serve a variety of important constitutional concerns.

First, this Court has held that courts should avoid construing statutes in ways that raise serious federalism concerns. See, *e.g.*, *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). Perhaps no aspect of states' power is more central to their role than enforcement of their criminal statutes. See, *e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 209 (1998) ("One of the primary functions of government * * * is the preservation of societal order through enforcement of the criminal law * * *.") (citations omitted). As already explained, the Tenth Circuit's interpretation permits federal courts to trench wholesale on a state court's judgment regarding how its criminal sentences should be served. It allows federal district courts universal latitude to override a state's considered judgment. Indeed, the order issued in this case requires that petitioner's federal sentence run consecutively to *any* state-court sentence imposed at *any* time in the future, even for crimes for which petitioner has not yet been charged or convicted – indeed, even for crimes that have not yet been committed. This is a breathtaking assertion of

federal power. It places states that wish to impose concurrent sentences with the Hobson's choice of either acquiescing to a federal court's desire that all sentences run consecutively or forgoing sentencing a defendant at all. By contrast, the interpretation adopted by the Sixth and Ninth Circuits confines a federal court's authority to override a state's judgment to a narrower category of cases in which there are reasons to think the federal court has superior information – namely, cases in which the federal court acts subsequent to the state court.

Second, this Court has repeatedly held that statutes should be construed to avoid constitutional problems. See, *e.g.*, *McConnell* v. *Federal Election Comm'n*, 540 U.S. 93, 180 (2003). Even the courts that permit federal district courts to control the execution of after-imposed sentences acknowledge that their rule gives rise to significant separation of powers and comity concerns. See *Mayotte*, 249 F.3d at 799. Under their reading, a federal sentence imposed while state charges are pending is presumed to run consecutively to any later-imposed state sentence. Even if a subsequent state court decision orders that the sentence it imposes run concurrently and the prisoner is in state custody at the time of his state sentencing, effective control over service of the sentences passes to the federal BOP, because it has the power to decide whether to accept custody over the prisoner and therefore whether he will receive credit for service of his federal sentence.[7] The BOP is, of course, part of the executive

---

[7] Because a defendant already in state custody will begin serving the state sentence in a state prison first, the BOP has the discretion either to designate the state prison as the place of federal confinement or to refuse to start the clock on the defendant's federal sentence until the state sentence is fully served. See, *e.g.*, *Brown* v. *Ashcroft*, 41 Fed. Appx. 873, 874-75 (CA7 June 21, 2002) (unpublished) (noting BOP's sole discretion to make sentences run concurrently when federal court was silent and state court ordered concurrent sentences); see also *Barden* v. *Keohane*, 921 F.2d 476, 482-83 (CA3 1990) (same).

branch, which also controls the prosecutorial function. Thus, the majority interpretation of Section 3584(a), by conferring the power to determine concurrency on the BOP, rather than leaving it to the courts, runs afoul of separation of powers principles.[8] See *Abdul-Malik*, 403 F.3d at 76; see also *Cozine*, 15 F. Supp. 2d at 1004 (recognizing possibility that "low-level prison officials can effectively override the decisions of the state and federal sentencing courts"); *Griffin* v. *Pennsylvania Dep't of Corr.*, 862 A.2d 152, 158 n.7 (Pa. Commw. Ct. 2004). (describing as "troubl[ing]" the possibility that "administrative officials in certain instances, just by deciding whether an inmate is to serve federal or state time first, can determine whether an individual is to serve many years more in prison than the sentencing judges envisioned").

Particularly alarming is the prospect, which the Seventh Circuit's interpretation permits, that the BOP may impose a de facto sentence longer than either sentencing court had intended. See *Abdul-Malik*, 403 F.3d at 75. Under the Seventh Circuit rule, the first sentencing judge has no authority to order a sentence to run concurrently or consecutively, and only the BOP has discretion, regardless of what the judge may declare. *Romandine*, 206 F.3d at 737-

---

[8] To the extent that the separation of powers concerns voiced by the Second Circuit arise from the exercise of discretion on the part of the Attorney General, petitioner notes that such discretion is not supported by either the statute or its legislative history. Although the Attorney General has "wide discretion in choosing the place of a prisoner's confinement," *Barden*, 921 F.2d at 481, and – as this Court has found – the Attorney General has the responsibility for determining "sentencing credit," *United States* v. *Wilson*, 503 U.S. 329, 334 (1992), this is very different from granting the Attorney General the discretion whether to run an entire federal sentence consecutively to or concurrently with another sentence. See *supra* at 7-8.

38.[9] Because the interpretation of Section 3584(a) adopted by the Sixth and Ninth Circuits mitigates the separation of powers concerns inherent to the majority rule and exacerbated by the Seventh Circuit's rule, such a construction is preferable. *McConnell*, 540 U.S. at 180.

Third, the majority position ignores the rule of lenity. "'When there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.'" *Scheidler* v. *Nat'l Org. Women*, 537 U.S. 393, 409 (2003) (quoting *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987)). See also, *e.g.*, Sample, *supra*, at 985-86. Thus, even if both the majority construction of the statute – viz., permitting federal district courts to control the execution of subsequently imposed sentences – and the approach of the Sixth and Ninth Circuits – viz., prohibiting federal courts from exercising such control – were plausible, the latter approach should prevail.

4. A construction that infers that Congress intended to permit district courts to prohibit later courts from imposing a consecutive sentence also defies "common sense."[10]

---

[9] To be sure, as noted above, *supra* at 7-8, the BOP itself declines the broad discretion accorded to it by the Seventh Circuit and will act in accordance with the intent of a federal judge. Nevertheless, given the Seventh Circuit rule, one would imagine that district courts will simply remain silent, thus triggering the BOP's discretion. Furthermore, the BOP may change its policy at any time.

[10] This is only confirmed by the fact that in many states, state courts cannot bind subsequent courts in connection with non-existent sentences. See, *e.g.*, *People* v. *Lister*, 202 Cal. Rptr. 37, 38-39 (Ct. App. 1984) (holding that a California court "had no power to impose sentence consecutive to a federal sentence which had not yet been pronounced"); *People* v. *Flower*, 644 P.2d 64, 66 (Colo. Ct. App. 1981) ("a trial court may not require a sentence otherwise properly imposed to be served consecutively to some other sentence not yet imposed in another pending case"); *Oquendo* v.

McCarthy, 146 F.3d at 122. In the case of an unimposed sentence, only the later sentencing court will know the total length of a consecutive term of imprisonment. Similarly, only the later sentencing court will be aware of a variety of factors – such as cooperation with the authorities or the relationship between the offenses underlying the two sentences – that may develop after the imposition of the first sentence and that might justify concurrent service. Thus, the later sentencing court is in the best position to decide what sentence would be appropriate and just. As Judge Newman has explained, "[i]mposition of a consecutive sentence is strong medicine" that "should be used only after awareness of a sentence already imposed so that the punitive effect of the consecutive sentence is carefully considered at the time of its imposition. * * * The length of a primary sentence is always relevant to a reasoned decision concerning both the length of a consecutive sentence and the choice of imposing it consecutively." *Salley*, 786 F.2d at 548 (Newman, J., concurring in the result); see also *Smith*, 101 F. Supp. 2d at 343 (explaining that petitioner's interpretation of Section 3584(a) "makes eminent sense, because there is no way to tell whether a pending state charge is going to result in acquittal, conviction, guilty plea, * * * or some other disposition, or what the state sentence

---

Quinones, 738 N.Y.S.2d 398, 400 (N.Y. App. Div. 2002) (construing a New York statute to bar a state court from ordering a sentence to run concurrently with a subsequent federal sentence); *State* v. *Alexander*, 162 Ohio App. 3d 333 (2005) ("when a trial court imposes a sentence and orders it to be served consecutively with any future sentence to be imposed, such a sentence interferes with the discretion granted the second trial judge to fashion an appropriate sentence or sentences") (quoting *State* v. *White*, 41 N.E.2d 596 (Ohio 1985)); C.J.S. *CRIMLAW* § 1524 (2005) (stating that the general rule is "[t]he decision as to whether sentences imposed at different times shall run consecutively or concurrently should be made by the last judge imposing sentence" and citing no state exceptions).

will be * * *, and attempting to achieve a just and fair total time of confinement * * * by sequential reference to a non-existing state sentence is certainly problematic, to say the least"). Imposing a sentence consecutive to an unimposed term also allows the "second judge [to] extend the expiration date of the first judge's sentence." *Salley*, 786 F.2d at 548 (Newman, J., concurring in the result); see also *Clayton*, 921 F.2d at 493 (finding that federal sentence directed to run consecutively to unimposed state sentence "infringes upon the rights of the defendant" because it prejudices the defendant's "right to have a state court consider whether a state sentence should run concurrently with his federal sentence") (internal quotations omitted).

5. If additional guidance beyond the plain language and canons of construction were required to construe Section 3584(a), then the legislative history of the statute also indicates that the Tenth Circuit erred. The legislative history – both through what it says *and* through its silence with regard to unimposed state sentences – confirms petitioner's reading of the statute. As the Second Circuit has recognized, the legislative history indicates that the "drafters of § 3584(a) were concerned with the imposition of a federal sentence on a defendant *already* serving either a state sentence or another federal sentence." *McCarthy*, 146 F.3d at 122 (quoting S. Rep. No. 98-225, at 126 (1983)) (emphasis added). According to the Senate Report: "[Section 3584(a)] provides that sentences to multiple terms of imprisonment may * * * be imposed to be served either concurrently or consecutively, whether they are imposed at the same time or one term of imprisonment is imposed *while the defendant is serving another one*." *Ibid.* (emphasis added). The statute thus "changes the law that now applies to a person sentenced for a Federal offense *who is already serving a term of imprisonment for a State offense*." S. Rep. No. 98-225, at 126 (1983), reprinted in 1984 U.S.C.C.A.N 3182, 3309 (emphasis added). Tellingly, the discussions of consecutive sentences in the Senate Report do not mention unimposed state sentences.

These discussions refer variously to "a term of imprisonment imposed on a person *already serving* a prison term," to sentences "imposed while the defendant *is serving* another one," and, as noted above, to "a person sentenced for a Federal offense who is *already serving* a term of imprisonment for a State offense." *Id.* at 126-27 (emphases added). That these discussions do not refer to unimposed state sentences, but frequently refer to sentences already being served, strongly suggests that the Sixth and Ninth Circuits' construction of Section 3584(a) captures Congress's intent.

The Senate Report also specifically disapproved the holding of *United States* v. *Segal*, 549 F.2d 1293 (CA9 1977). See S. Rep. No. 98-225, at 127 n.435. In *Segal*, the Ninth Circuit had held that a federal court could not impose a sentence that would run concurrently to an *already imposed* state sentence. 549 F.2d at 1301. Section 3584(a) was thus enacted to give federal courts the power to impose a concurrent sentence to an already imposed state sentence. It is therefore contrary to the legislative history of the statute and a violation of the principle of comity to construe Section 3584(a) to mean that Congress simultaneously granted federal courts the power to impose concurrent sentences relative to already imposed state sentences and interfered with the power of state courts to do exactly the same thing. Cf. *Younger* v. *Harris*, 401 U.S. 37, 44 (1971) ("["Our Federalism" represents] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."). Not surprisingly, the circuits adopting the more expansive reading of the statute ignore this history.

Thus, the legislative history indicates that Congress intended precisely what the plain meaning of the statute states. Congress certainly did not intend to strip state courts

of the power to order concurrent sentences, much less implement a broad delegation of quasi-judicial authority to the BOP.[11]

IV. Petitioner's Case Is an Ideal Vehicle to Decide the Question Presented.

This case presents an especially suitable vehicle to resolve the question presented. The issue was squarely presented and resolved below; indeed, it was the only argument advanced by petitioner on appeal. Moreover, petitioner would manifestly benefit from a ruling in his favor. In *Andrews*, although the government agreed that the circuits were divided with regard to the question presented, it argued that the case was an inappropriate vehicle because no court had expressed the desire to have its sentence run concurrently. *Andrews* BIO 10. Here, by contrast, the state court, which has not yet even imposed its sentence, has specifically indicated that it considers a forty-eight-year sentence, served concurrently with petitioner's federal sentence, to be appropriate. Indeed, it approved a plea bargain that required precisely such a sentence. Although the state court's efforts proved fruitless in light of the Tenth Circuit's adherence to the majority rule, the application of the rule adopted by the Sixth and Ninth Circuits would have resulted (and still would result) in a state court order requiring that petitioner serve his state sentence concurrently to his federal sentence.

---

[11] To the contrary, because the predecessor statutes precluded federal courts from ordering a consecutive or concurrent sentence, authority to determine whether a sentence should be served consecutively or concurrently to an *already* imposed sentence rested with the BOP. *United States* v. *Fuentes*, 107 F.3d 1515, 1519 n.6 (CA11 1997); *Cozine*, 15 F. Supp. 2d at 1004 n.2; see also S. Rep. No. 98-225, at 129, reprinted in 1984 U.S.C.C.A.N at 3312. Thus, the enactment of Sections 3584(a) and 3585(a) served to limit the discretion of the BOP in connection with concurrent or consecutive sentences.

The government further argued in *Andrews* that even if this Court were to adopt the rule petitioner advocates, it would not have changed the outcome. Had this Court simply vacated Andrews's sentence, it would still have been the case that the other sentence would already have been imposed. Because Andrews would be "already subject to an undischarged term of imprisonment" (namely, his state prison sentence), the district court would be free to order that the federal sentence run consecutively. *Andrews* BIO 14. Such an argument carries no weight in this case. Here, the Colorado state court has not yet imposed its sentence.[12] Moreover, if the Court holds that the district court lacked the power to designate its sentences as consecutive, that error could be remedied simply by striking that designation from the sentence of the trial court. See, *e.g.*, *State v. Blevins*, 394 N.W.2d 663, 664 (Neb. 1986) (modifying Nebraska court's sentence to strike from the sentencing order, as surplusage, the language, '[s]aid sentence shall be served consecutive to any sentence received by the defendant in Colorado'"). There would then be nothing left for the lower courts to do, and thus no reason to remand the case.

---

[12] To the extent that petitioner's state sentence has been imposed by the time the Court considers this petition, certiorari is nonetheless warranted because the question presented falls squarely within the doctrine of "capable of repetition, yet avoiding review." See, *e.g.*, *Olmstead* v. *L.C.*, 527 U.S. 581, 594 (1999).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Clifford Barnard
ATTORNEY AT LAW
1790 30th Street, Suite 280
Boulder, CO 80301

Thomas C. Goldstein
Amy Howe
(Counsel of Record)
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

October 5, 2005

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 04-1378

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

V.

WILLIAM ALLEN COX,
DEFENDANT-APPELLANT.

Filed April 21, 2005

Appeal from the United States District Court
for the District of Colorado

Before: SEYMOUR, HARTZ, and McCONNELL, Circuit Judges.

McCONNELL, Circuit Judge:

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). This case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Defendant-Appellant William Allen Cox pled guilty to the charges in a three-count federal indictment. Between the

indictment and the plea in the federal case, he pled guilty to second-degree murder in state court in Colorado. In the federal case, he was sentenced to an aggregate sentence of 168 months, to run consecutively to his sentence on the state charge, which had not yet been imposed. Mr. Cox preserved an objection to the consecutive nature of the sentence. In *United States v. Williams*, 46 F.3d 57 (10th Cir. 1995), this Court held that it is permissible for a district court to order a sentence to run consecutively to a possible future state sentence. There is a split among the circuits on this issue, with the Second, Fifth, Eighth, and Eleventh Circuits holding such sentences permissible, and the Ninth, Sixth, and Seventh Circuits taking the opposite view. *Compare Salley v. United States*, 786 F.2d 546, 547 (2d Cir. 1986); *United States v. Brown*, 920 F.2d 1212, 1216-17 (5th Cir. 1991); *United States v. Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001); and *United States v. Ballard*, 6 F.3d 1502, 1510 (11th Cir. 1993), with *United States v. Quintero*, 157 F.3d 1038, 1039-41 (6th Cir. 1998); *Romandine v. United States*, 206 F.3d 731, 737-39 (7th Cir. 2000); and *United States v. Clayton*, 927 F.2d 491, 492-93 (9th Cir. 1991).

In his brief in this Court, Mr. Cox acknowledges that, because of the panel ruling in *Williams*, "he cannot prevail on this issue at the Tenth Circuit panel level, but will ask for a hearing en banc in which he will ask the full Tenth Circuit to review this issue." He is correct about that. The panel can do nothing for him, and will await with interest his petition for rehearing *en banc*.

The judgment of the United States District Court for the District of Colorado is therefore **AFFIRMED**.

Entered for the Court,

Michael W. McConnell

Circuit Judge

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

UNITED STATES OF AMERICA

v.

WILLIAM ALLEN COX

JUDGMENT IN A CRIMINAL CASE

Case Number: 03-CR-444-RB
USM Number: 32163-013
Clifford Barnard, Appointed
(Defendant's Attorney)

THE DEFENDANT: Pleaded guilty to Counts One, Two, and Three of the Indictment.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 U.S.C. § 1951	Hobbs Act Violation (Interference With Commerce by Threats and Violence)	03/31/03	One
18 U.S.C. § 924(c)(1)(a)	Possess and Brandish a Firearm in Furtherance of a Crime of Violence	03/31/03	Two

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

It is further ordered that the Addendum to this judgment, which contains the defendant's social security number, residence address and mailing address, shall be withheld from the court file and retained by the United States Probation Department.

September 1, 2004

Robert E. Blackburn, U.S. District Judge

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1)	Felon in Possession of Firearm	03/31/03	Three

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of eighty-four (84) months on each of Counts One and Three, to be served concurrently with each other; and seven

(7) years on Count Two, to be served consecutively to Counts One and Three, for a total sentence of one hundred sixty-eight (168) months. Pursuant to U.S. v. Williams, 46 F.3d 57, 58 (1995), the total term of imprisonment shall be served consecutively to any sentence yet to be imposed in state court, including Denver County District Court, Colorado, Case Number 2003CR2984.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on _____ to

_____

At , _____, with a certified copy of this judgment.

UNITED STATES MARSHAL
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years on each of Counts One and Three, and five (5) years on Count Two, with such terms of supervised release to be served concurrently.

The defendant must report to the probation office in the district to which he is released within 72 hours of his release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and two periodic drug tests thereafter.

The defendant shall not possess a firearm as defined in 18 U.S.C. § 921

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons.

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia

related to any controlled substance, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) The defendant shall provide the probation officer with access to any requested financial information.

ADDITIONAL CONDITIONS OF SUPERVISION

The defendant shall undergo, at his own expense, an evaluation for alcohol and substance abuse, and shall undergo a mental health evaluation. Thereafter, the defendant shall receive at his own expense any treatment, therapy, counseling, testing or education prescribed by these evaluations or as directed by the Probation Department.

MONETARY OBLIGATIONS

The defendant must pay total monetary obligations under the schedule of payments set forth below.

Count	Assessment	Fine	Restitution
One	$100.00	$0.00	$0.00
Two	$100.00	$0.00	$0.00
Three	$100.00	$0.00	$0.00
TOTAL	$300.00	$0.00	$0.00

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total monetary obligations is due as follows:

The special assessment fee is due in full immediately.

All monetary obligation payments, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any monetary obligations imposed.

Payments shall be applied in the following order: (1) special assessment.

STATEMENT OF REASONS

The court adopts the presentence report and guideline applications without change.

GUIDELINE RANGE DETERMINED BY THE COURT (BEFORE DEPARTURES):

Total Offense Level: 23 (Counts One and Three)

Criminal History Category: V

Imprisonment Range: 84 to 105 months (Counts One and Two)

Imprisonment Term: 7 years, consecutive (Count Three)

Supervised Release Range: 2 to 3 years (Counts One and Three)

Supervised Release Range: 3 to 5 years (Count Two)

Fine Range: $1 0,000 to $1 00,000

The fine is waived because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart.

RESTITUTION DETERMINATIONS

Total Amount of Restitution: None.

The court concludes that this statement of reasons for imposing a sentence in a criminal case is presumptively a matter of public interest and scrutiny. See S. Rep. No. 225, 98th Cong., 1st Sess. 1983, 1984 U.S.C.C.A.N. 31 82, 3263 (1983) ("The statement of reasons . . . informs defendant and the public of the reasons for the sentence. It provides information to criminal justice researchers.") No party has made a sufficient showing of "good cause," Fed R. Crim. P. 32(i)(4)(C), why it should not be a matter of public record. Therefore, to facilitate systematic documentation of any decision concerning departure, in compliance with 18 U.S.C.A. § 3553(c)(2), this statement of reasons shall be entered and filed by the clerk as part of the judgment.

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
DISTRICT OF COLORADO

CERTIFICATE OF MAILING

Case No. 03-CR-444-RE3
September 10, 2004

Copies of this Judgment and Commitment order were served by hand delivery or by United
States mail, postage prepaid, addressed to the persons listed below.

U. S. Marshal (hand delivered)
(3 certified copies, 1 non-certified)

Josh Stein (hand-delivered)
Assistant U. S. Attorney

U. S. Probation (hand delivered)
(2 certified copies, 1 non-certified)

Pretrial Services (hand delivered)

Clifford Barnard (mailed)
1790 30th Street, # 280
Boulder, CO 80301

Financial Litigation Unit (hand delivered)
U. S. Attorney's Office

Carol Henderson (hand delivered)

Financial Deputy

Judge Robert E. Blackburn (hand delivered)

GREGORY C. LANGHAM, CLERK
By: _____
Christie M. de la Garza, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 04-1378

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

V.

WILLIAM ALLEN COX,
DEFENDANT-APPELLANT.

ORDER

Filed June 7, 2005

Before SEYMOUR, HARTZ and McCONNELL, Circuit Judges.

Appellant's petition for rehearing is denied.

The Petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

By: _____
Deputy Clerk

2

FILED
DEC 7 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-454

In the Supreme Court of the United States

WILLIAM ALLEN COX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

THOMAS E. BOOTH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a district court has the authority under 18 U.S.C. 3584(a) to direct that a federal sentence be served consecutively to a state sentence that may be imposed in future state court proceedings.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 4
Conclusion 10

TABLE OF AUTHORITIES

Cases:

Abdul-Malik v. *Hawk-Sawyer*, 403 F.3d 72 (2d Cir. 2005) 5
Andrews v. *United States*, 540 U.S. 1003 (2003) 6
Covell v. *Heyman*, 111 U.S. 176 (1884) 6
Jake v. *Herschberger*, 173 F.3d 1059 (7th Cir. 1999) 6
Lackey v. *United States*, 125 S. Ct. 2963 (2005) 6
Martinez v. *United States*, 125 S. Ct. 1299 (2005) 6
Ponzi v. *Fessenden*, 258 U.S. 254 (1922) 6
Romandine v. *United States*, 206 F.3d 731 (7th Cir. 2000) 5
Strand v. *Schmittroth*, 251 F.2d 590 (9th Cir.), cert. dismissed, 355 U.S. 886 (1957)) 6
Taylor v. *Sawyer*, 284 F.3d 1143 (9th Cir. 2002), cert. denied, 537 U.S. 1119 (2003) 6
United States v. *Andrews*, 330 F.3d 1305 (11th Cir.), cert. denied, 540 U.S. 1003 (2003) 5
United States v. *Brown*, 920 F.2d 1212 (5th Cir.), cert. denied, 500 U.S. 925 (1991) 5
United States v. *Clayton*, 927 F.2d 491 (9th Cir. 1991) ... 5
United States v. *Gonzalez*, 520 U.S. 1 (1997) 7, 9

Cases—Continued: Page

United States v. *Mayotte*, 249 F.3d 797 (8th Cir. 2001) ... 5
United States v. *Moreno-Hernandez*, 48 F.3d 1112 (9th Cir.), cert. denied, 515 U.S. 1151 (1995) 10
United States v. *Rivera*, 327 F.3d 612 (7th Cir.), cert. denied, 540 U.S. 922 (2003) 10
United States v. *Quintero*, 157 F.3d 1038 (6th Cir. 1998) 5
United States v. *Williams*, 46 F.3d 57 (10th Cir.), cert. denied, 516 U.S. 826 (1995) 4, 5

Statutes:

Hobbs Act, 18 U.S.C. 1951 ..... 2, 3, 4, 10
18 U.S.C. 922(g)(1) 2, 3, 4, 10
18 U.S.C. 924(c)(1) 7
18 U.S.C. 924(c)(1)(A) 2, 4, 9
18 U.S.C. 924(c)(1)(A)(ii) 3
18 U.S.C. 924(c)(1)(D)(ii) 9
18 U.S.C. 3584(a) 5, 8, 9
28 U.S.C. 2106 10

Miscellaneous:

Federal Bureau of Prisons, U.S. Dep't of Justice, *Program Statement No. 5160.05* (2003) 7

In the Supreme Court of the United States

No. 05-454

WILLIAM ALLEN COX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is reprinted at 125 Fed. Appx. 973.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 2005. A petition for rehearing was denied on June 7, 2005 (Pet. App. 12a). On August 25, 2005, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including October 5, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In September 2004, in the United States District Court for the District of Colorado, petitioner pleaded guilty to interference with commerce by threats and violence in furtherance of a robbery, in violation of the Hobbs Act, 18 U.S.C. 1951; possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1); and possession and brandishing of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). He was sentenced to a total of 168 months of imprisonment. The court directed the sentence to run consecutive to any sentence yet to be imposed in state court. The court of appeals affirmed. Pet. App. 1a-2a.

1. a. On February 19, 2003, petitioner murdered a man in a drug-related dispute. According to the autopsy report, the victim suffered multiple stab wounds to the head and neck and a gunshot wound to the face. The state of Colorado charged petitioner with First Degree Murder After Deliberation. See Presentence Investigation Report paras. 71-74 (PSR).

b. On March 31, 2003, petitioner and an accomplice entered a gun store in Adams County, Colorado. Petitioner brandished a pistol, assaulted the gun owner, and stole 47 firearms and approximately $900 in cash. Petitioner fled in his car, and police pursued him. Petitioner crashed his car and attempted to flee on foot. The police seized the 47 firearms from petitioner's car, as well as the loaded firearm used by petitioner to commit the offense. Petitioner was later apprehended. Petitioner's actions with respect to the gun store robbery resulted in the federal indictment, to which petitioner pleaded guilty. PSR paras. 5-7.

2. On February 12, 2004, between petitioner's indictment and his guilty plea on the federal charges, petitioner pleaded guilty to second-degree murder in state court in Colorado as a result of the February 2003 murder. Pet. App. 1a-2a; PSR para. 71. The state court sentenced petitioner to 48 years of imprisonment to run "concomitant to the federal sentence." PSR para. 71. On June 9, 2004, however, the state court vacated that sentence upon being advised by petitioner's counsel that the federal court likely would impose a sentence to run consecutively to the state sentence. See Second Addendum to the PSR A-1; see also PSR para. 120; Gov't Sentencing Br. 1-2.[1]

3. On September 1, 2004, petitioner was sentenced on the federal offenses. Petitioner's sentencing range under the federal Sentencing Guidelines for the Hobbs Act and Section 922(g)(1) offenses was 84 to 105 months of imprisonment. His sentencing range for the Section 924(c)(1)(A)(ii) offense was seven years, which had to be imposed consecutive to any other term of imprisonment. PSR paras. 117, 119.

Petitioner objected to any sentence that would run consecutive to his state sentence on the murder conviction. The district court overruled the objection, observing that the state and federal offenses were not, "as a matter of fact and law * * * part of a single criminal episode," 9/1/04 Tr. 17, that the federal charges constituted "most serious felony offenses," *id.* at 19, and that

---

[1] The state court originally scheduled a resentencing hearing for two days after the federal sentencing date. See Second Addendum to the PSR A-1. As of the filing of the petition for a writ of certiorari in this case, however, the state court had not resentenced petitioner, Pet. 4, and it is the United States' understanding that the state court has not done so as of the filing of this response.

petitioner was "as dangerous a person as has come into my courtroom." *Id.* at 18.

The district court sentenced petitioner to 84 months on the Hobbs Act and Section 922(g)(1) counts, and a consecutive seven-year sentence on the Section 924(c)(1)(A) count, for a total of 168 months. The court directed that the total term of imprisonment be "served consecutively to any term of imprisonment yet to be imposed in any court, including, but not limited to, the sentence to be imposed" in the state murder case. 9/11/04 Tr. 26. In so doing, the district court acknowledged the state court's efforts to have the state sentence run concurrently with the federal sentence, but noted its duty to impose a "lawful and just sentence" under the circumstances of the federal offenses. *Id.* at 18. The district court indicated its understanding that the state court could nevertheless take steps "[t]o put itself in a position to sentence [petitioner] concurrently." *Id.* at 16.

4. The court of appeals affirmed in a short, unpublished per curiam opinion. Pet. App. 1a-2a. The court rejected petitioner's argument that the district court lacked authority to direct that his sentence be served consecutively to a state sentence not yet imposed. It explained that, as petitioner had conceded, the argument was foreclosed by the Tenth Circuit's decision in *United States* v. *Williams*, 46 F.3d 57, cert. denied, 516 U.S. 826 (1995). Pet. App. 2a.

ARGUMENT

Petitioner renews his claim (Pet. 5-26) that the district court did not have the authority to direct that his sentence run consecutively to a state sentence that had not yet been imposed. According to petitioner, under

18 U.S.C. 3584(a), a district court's ability to impose a sentence consecutive to a state sentence is limited to instances where the defendant "is already subject to" the state sentence. 18 U.S.C. 3584(a). Petitioner contends that the court of appeals' rejection of that interpretation conflicts with decisions of other courts of appeals.

Petitioner is correct that the courts of appeals disagree about whether a federal court has the authority to direct that a sentence be served consecutively to a yet-to-be imposed state sentence. In addition to the Tenth Circuit, the courts of appeals for the Fifth, Eighth, and Eleventh Circuits have held that district courts have such authority. See *United States* v. *Andrews*, 330 F.3d 1305, 1306-1307 (11th Cir.) (per curiam), cert. denied, 540 U.S. 1003 (2003); *United States* v. *Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001) (per curiam); *United States* v. *Brown*, 920 F.2d 1212, 1217 (5th Cir.) (per curiam), cert. denied, 500 U.S. 925 (1991). The courts of appeals for the Sixth, Seventh, and Ninth Circuits have held that district courts lack that authority. *Romandine* v. *United States*, 206 F.3d 731, 737-738 (7th Cir. 2000); *United States* v. *Quintero*, 157 F.3d 1038, 1039-1040 (6th Cir. 1998); *United States* v. *Clayton*, 927 F.2d 491, 492 (9th Cir. 1991).[2] Resolv-

[2] In *Romandine*, the Seventh Circuit concluded that, under the last sentence of Section 3584(a), whenever a state sentence is imposed at a different time than a federal sentence, those two sentences run consecutively unless the district court directed otherwise. *Romandine*, 206 F.3d at 737-738. The Tenth Circuit also reached the same conclusion. See *Williams*, 46 F.3d at 59. The Second and Sixth Circuits dispute that position, and have stated that the final sentence of Section 3584(a) applies only if the defendant is already subject to a state sentence at the time of the federal sentencing. *Abdul-Malik* v. *Hawk-Sawyer*, 403 F.3d 72, 75 (2d Cir. 2005); *Quintero*, 157 F.3d at 1040. If

ing that conflict is unnecessary, however, and further review is not warranted.[3]

1. Resolving whether district courts have the power to impose a sentence that is to run consecutively to an as-yet-unimposed state sentence is unnecessary because a district court's order that a defendant's sentence be served consecutively to an anticipated state sentence is not binding on state courts. This Court has long recognized that although state and federal courts "co-exist in the same space, *they are independent*, and have no common superior." *Ponzi* v. *Fessenden*, 258 U.S. 254, 261 (1922) (quoting *Covell* v. *Heyman*, 111 U.S. 176, 182 (1884)) (emphasis added). "[O]ur federal system is one of 'dual sovereignty,' and not one in which the Supremacy Clause controls sentencing." *Taylor* v. *Sawyer*, 284 F.3d 1143, 1150 (9th Cir. 2002) (quoting *Strand* v. *Schmittroth*, 251 F.2d 590, 605 (9th Cir.), cert. dismissed, 355 U.S. 886 (1957)), cert. denied, 537 U.S. 1119 (2003). Each sovereign has "full power to set punishment for crimes against the * * * sovereign" unconstrained by the other sovereign. *Id.* at 1151. Consequently, "a determination as to concurrence of sentence made by one sovereign does not bind the other." *Jake* v. *Herschberger*, 173 F.3d 1059, 1065 (7th Cir.

---

the Seventh and Tenth Circuits' view is correct, resolving whether the district courts have the power to impose consecutive sentences would serve no purpose, because even if a district court did not have the power to impose a sentence explicitly running consecutively to an as-yet-unimposed state sentence, it could still achieve the same result simply by not ordering that the sentences be concurrent.

[3] This Court denied review of this issue in *Lackey* v. *United States*, 125 S. Ct. 2963 (2005) (No. 04-9286), *Martinez* v. *United States*, 125 S. Ct. 1299 (2005) (No. 04-7129), and *Andrews* v. *United States*, 540 U.S. 1003 (2003) (No. 03-136).

1999). Thus, as a general matter, neither state courts nor state prison systems are bound by federal court orders concerning consecutive or concurrent sentencing. Cf. Federal Bureau of Prisons, U.S. Dep't of Justice, *Program Statement No. 5160.05*, at 3 (2003) ("Just as the federal government has no authority to prescribe when a state sentence will commence, the state has no authority to order commencement of a federal sentence."); cf. *United States* v. *Gonzalez*, 520 U.S. 1, 11 (1997) (in case involving consecutive sentence under 18 U.S.C. 924(c)(1), which then provided that no term of imprisonment imposed under it "shall * * * run concurrently with any other term of imprisonment," reserving the question "whether a later sentencing state court is bound to order its sentence to run consecutively to the [18 U.S.C.] § 924(c) term of imprisonment").

States may make their sentences concurrent to federal sentences if a defendant is in primary federal custody by designating the defendant's federal institution for service of the state sentence. If a defendant is in primary state custody, the state court can make the state sentence effectively concurrent to a subsequent federal sentence by deducting the length of the federal sentence from the time spent in the state system at sentencing, or by suspending a portion of the sentence. In addition, a defendant in state custody, a state court, or a state prison system can seek to have the Bureau of Prisons designate the state facility as the place for service of his federal sentence. See *Program Statement No. 5160.05*, *supra*, at 4-7.

Petitioner disputes (Pet. 10-14) the effectiveness of such measures and argues that they require state courts to engage in unseemly maneuvers to effectuate their sentencing intentions, which is asserted to be "an

affront to federal-state comity" and "state sovereignty." Pet. 12. But the interplay of state and federal sentencing intentions simply reflects the fact that each sovereign is entitled to decide whether its punishment should be cumulative of the other's. This case illustrates that the later-sentencing sovereign often has an advantage in effectuating its goal. If the state court had not vacated its initially-imposed sentence, petitioner would have been "already subject" to an undischarged state sentence at the time of his federal sentencing. Thus, but for the state court's actions, the federal court would have had the ability, even under petitioner's view of Section 3584(a), to order the federal sentence to run consecutively to the state sentence—despite the state court's previous (and still extant) decision that the state sentence should run concurrently. Such a federal sentence would have had, if anything, greater implications for the state court's ability to effectuate petitioner's state plea agreement (see Pet. 12-13) than the sentence that the federal court did impose. The interpretation of Section 3584(a) adopted by the court below thus does not significantly add to any federalism tensions created by the statute.

2. In any event, this case is not a suitable vehicle to resolve the conflict among the courts of appeals. Petitioner is currently serving his federal sentence and has not been resentenced on his state murder conviction. See Pet. 4; note 1, *supra*. The state court has indicated that it will seek to impose a sentence that will run concurrently with the instant federal sentence. Moreover, the federal court, despite its stated intent that the federal sentence run consecutive to any state sentence, expressly recognized that the state court could take steps "[t]o put itself in a position to sentence [peti-

tioner] concurrently." 9/1/04 Tr. 16. Accordingly, it is at best unclear how the state and federal sentences will interact. Indeed, given that the state court will have the last word on the issue, the state court's resentence could render irrelevant the district court's order that its sentence run consecutive to the state sentence.[4] At bottom, any claim of harm to petitioner from the order of consecutive sentences is speculative.

Moreover, petitioner may not obtain the relief he seeks even if this Court were to adopt the rule he advocates with respect to the construction of 18 U.S.C. 3584(a). As petitioner notes (see Pet. 25), the state court may resentence petitioner while this case is pending. In that event, if this Court were to adopt the rule he advocates, vacate the judgment of the court of appeals, and remand the case for resentencing, petitioner would be "already subject to an undischarged term of imprisonment," 18 U.S.C. 3584(a), (*i.e.* his state prison sentence) at the time of imposition of his federal sentence. Accordingly, even under petitioner's reading of Section 3584(a), the district court would be free in that circumstance to order that the federal sentence run consecutively to the state sentence.[5]

---

[4] It is an open question whether the state court could order its sentence to run concurrent with petitioner's seven-year sentence for the Section 924(c)(1)(A) conviction, which Section 924(c)(1)(D)(ii) requires be consecutive to any other sentence. See *Gonzalez*, 520 U.S. at 11.

[5] Petitioner suggests that, if the Court were to hold that the district court lacked the authority to run its sentence consecutively to an unimposed state sentence, "that error could be remedied simply by striking that designation from the sentence of the trial court," without the need to remand for resentencing. Pet. 25. If the Court were to adopt petitioner's construction of Section 3584(a), however, a remand for resentencing would be appropriate to allow the district court to reconsider its entire sentence in light of the Court's ruling. The district

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
THOMAS E. BOOTH
Attorneys

DECEMBER 2005

---

court here might, for example, want to reconsider its order running the sentences on the Hobbs Act and Section 922(g)(1) counts concurrently if this Court were to hold that it lacked the authority to run the federal sentence consecutively to a future state sentence. Cf., *e.g.*, *United States* v. *Rivera*, 327 F.3d 612, 614-615 (7th Cir.) (holding that, where appellate court has reversed the conviction on one count, district court on remand can refashion the sentence on the remaining count to run it consecutively to a prior undischarged sentence even though, before the appeal, it had ordered the sentence to run concurrently), cert. denied, 540 U.S. 922 (2003); *United States* v. *Moreno-Hernandez*, 48 F.3d 1112, 1116-1117 (9th Cir.) (holding that, on remand for resentencing, district court may reconsider entire, interrelated sentencing package), cert. denied, 515 U.S. 1151 (1995); see also 28 U.S.C. 2106 ("The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.").

FILED
DEC 22 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-454

IN THE

Supreme Court of the United States

William A. Cox,
Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Clifford Barnard
ATTORNEY AT LAW
1790 30th Street, Suite 280
Boulder, CO 80301

Thomas C. Goldstein
Amy Howe
(Counsel of Record)
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

December 22, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
REPLY BRIEF FOR THE PETITIONER 1
CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Abdul-Malik v. *Hawk-Sawyer*, 403 F.3d 72 (CA2 2005) 3
Commonwealth v. *Mendoza*, 730 A.2d 503 (Pa. Super. Ct. 1999) 4
No. 04-9286, *Lackey* v. *United States*, cert. denied, 125 S. Ct. 2963 (2005) 5
No. 05-___, *Pierce* v. *Fleming*, CA5 No. 04-10987, 2005 U.S. App. LEXIS 22266 (CA5 Oct. 14, 2005) 8, 9
Olmstead v. *L.C.*, 527 U.S. 581 (1999) 6
Romandine v. *United States*, 206 F.3d 731 (CA7 2000) 2
United States v. *Quintero*, 157 F.3d 1038 (CA6 1998) 3
United States v. *Williams*, 46 F.3d 57 (CA10), cert. denied, 516 U.S. 826 (1995) 2

Statutes

18 U.S.C. 922(g)(1) 7
18 U.S.C. 924(c)(1)(A) 7
18 U.S.C. 924(c)(1)(D)(ii) 7
18 U.S.C. 3584(a) ..... passim

Other Authorities

B.O.P. Program Statement 5160.05 4

REPLY BRIEF FOR THE PETITIONER

The United States does not seriously dispute that the question presented by this case cries out for resolution by this Court. Like the Tenth Circuit in the decision below, see Pet. App. 2a, the government acknowledges that the courts of appeals are intractably divided over a district court's power to require that its sentence run consecutively to an unimposed term of imprisonment, see BIO 5. Moreover, the government does not dispute either that the question presented arises in countless cases, both on direct appeal and in federal post-conviction proceedings, or that it persistently results in different treatment for otherwise similarly situated defendants – here, for example, likely causing petitioner to serve an additional fourteen years in prison merely because he was sentenced in the Tenth Circuit rather than the Sixth or Ninth. See Pet. 9-10 nn.3-4 (citing cases). Indeed, as the government itself emphasizes, the question presented has been the subject of multiple petitions for certiorari. See BIO 6 n.3. Far from being a reason to deny certiorari, the fact that this Court has been repeatedly presented with petitions on this issue demonstrates that the conflict is real and important, and that certiorari is thus warranted. The government does not contend that the issue would benefit from further percolation in the lower courts; the question has, in fact, been thoroughly examined in the lower courts, resulting in a division that has not resolved itself in the almost fifteen years since it first arose. Thus, the government does not dispute that the conflict can only be resolved through this Court's intervention. Even with respect to the merits, the government does not dispute that the decision below is incorrect, conferring upon the district courts a power that Congress specifically withheld under the plain text of 18 U.S.C. 3584(a).

Instead, even though the case plainly satisfies each of this Court's criteria for granting certiorari, the government proffers a series of arguments that boils down to two main points: (1) there will *never* be an appropriate vehicle for this Court to

resolve the circuit split on the question presented, which in the government's view should forever evade review; and (2) in any event, certiorari is not warranted because even if the Tenth Circuit and like-minded courts have wrongly permitted district courts to usurp the authority of state courts to decide whether their later-imposed sentences shall be concurrent or consecutive to a prior federal sentence, the state courts can – through various machinations and in particular circumstances that irregularly recur – circumvent that erroneous holding to re-establish the balance of sentencing authority Congress intended. Neither argument undermines the compelling reasons for this Court to grant review.

1. As noted above, the United States does not dispute that petitioner's construction of Section 3584(a) is the correct one – *viz.*, that Section 3584(a) does *not* authorize a district court to impose a sentence that is consecutive to an as-yet-unimposed term of imprisonment. At most, the government suggests that the error *might* be inconsequential "*if* the Seventh and Tenth Circuits' view is correct" that the final sentence of Section 3584(a) establishes a presumption that multiple terms of imprisonment imposed at different times run consecutively unless the district court affirmatively orders that they run concurrently. See BIO 5-6 n.2 (emphasis added) (citing *Romandine* v. *United States*, 206 F.3d 731, 737-38 (CA7 2000), and *United States* v. *Williams*, 46 F.3d 57, 59 (CA10), cert. denied, 516 U.S. 826 (1995)). That is, the United States suggests that, even if district courts are prohibited from ordering consecutive sentences, they can nonetheless "achieve the same result simply by not ordering that the sentences be concurrent." *Ibid.*

Even that tepid defense of the holding below fails. First, the government does not actually argue that the view of the Seventh and Tenth Circuits *is* correct. In fact, as the petition explained and the government does not dispute, the Bureau of Prisons has concluded that it is *not*. See Pet. 7-8 & 20 n.9. That rejection is well-founded, for the reasons explained by at least two of the circuits. See BIO 5-6 n.2 (citing *Abdul-Malik*

v. *Hawk-Sawyer*, 403 F.3d 72, 75 (CA2 2005); *United States* v. *Quintero*, 157 F.3d 1038, 1040 (CA6 1998)). Those circuits hold instead – in rulings that only amplify the circuit conflict – that the presumption created by the last sentence of Section 3584(a) applies only to cases in which the other sentence has already been imposed. Put another way, in those circuits, the "court" that must determine whether to "order[] that the terms are to run concurrently" is the second sentencing court; only if the second sentencing court declines to order explicitly that the sentences run concurrently is the presumption triggered. See, *e.g.*, *Quintero*, 157 F.3d at 1041 ("The language neither abrogates the requirement that to run consecutively there be an undischarged sentence or sentences imposed at the same time nor expands a district court's authority * * *."); *Abdul-Malik*, 403 F.3d at 75 (final sentence of Section 3584(a) does not apply to cases in which federal sentence is imposed before imposition of the state sentence).

2. The United States also argues that, although numerous circuits erroneously permit a district court to order that its sentence run consecutively to an as-yet-unimposed state sentence, that error is unworthy of correction by this Court. This is so, the government argues, because even if Congress intended to permit the later court to determine whether its sentence would be concurrent or consecutive to the prior federal sentence, state courts in certain circumstances may be able to circumvent the federal court's illegal usurpation of that authority through various schemes and manipulations. The United States contends, for example, that when a defendant is in federal custody and the state wishes to ensure that its sentence is served concurrently, the state can conceivably do so by designating the federal institution for service of the state sentence. See BIO 7. And when a defendant is in state custody, the state court can effectively make the state sentence concurrent by reducing or suspending it, while the state can also seek to have the federal BOP designate the state prison as the place of service for the federal sentence. *Ibid.* Even assuming that states will in some cases seek to circumvent a

federal court's designation of a sentence as consecutive – and, as the petition noted (at 14), such cases are rare – both of the government's contentions are flawed.

First, in the case of defendants in federal custody, even if states may wish to designate a federal institution for service of a state sentence, there is no guarantee that state law would permit such a designation. To the contrary, there is a serious argument (adopted by some courts) that such a designation may be made only by the federal Bureau of Prisons, see, *e.g.*, *Commonwealth* v. *Mendoza*, 730 A.2d 503, 504 n.2 (Pa. Super. Ct. 1999) ("The decision of whether a federal prison in which an appellant is serving his federal sentence may be designated as a place of state confinement is to be made by the Federal Bureau of Prisons.").

Second, in the case of defendants in state custody, as the petition explained – and the government does not dispute – the BOP deems itself bound to follow the *federal* court's designation of its sentence as consecutive and thus will refuse state requests that it designate a state facility as the place of federal confinement. See Pet. 7-8 (citing B.O.P. Program Statement 5160.05 ¶ 9(b)(4)(f)). Moreover, mandatory minimum sentences may preclude state courts from rendering a sentence effectively concurrent by reducing or suspending it. See Pet. 12.

More importantly, even when such machinations are available, requiring state courts to manipulate their sentencing or petition the Bureau of Prisons for a favor to obtain Congress's intended result is a violation of comity that warrants correction by this Court. The United States seeks to downplay this substantial affront to state sovereignty, asserting that because each sovereign is entitled to decide the appropriate punishment for a particular defendant, "[t]he interpretation of Section 3584(a) adopted by the court below * * * does not significantly add to any federalism tensions created by the statute." BIO 8. The government's position thus boils down to the contention that in a system of dual sovereigns, some

conflict may be inevitable. That contention, however, presupposes that Congress intended to create such a conflict, and every indication from the legislative history (none of which the government addresses, much less disputes) is that it did not. See Pet. 22-24. Nor does the government offer any reason why such a conflict should be exacerbated – which is the unavoidable result of its construction – when petitioner's construction of Section 3584(a), which is the one Congress intended, minimizes the conflicts.

Finally, with its single-minded focus on the prospect that *states* could circumvent a federal court's designation of a consecutive sentence, the government has no answer to the petition's postulation (at 12) that such a designation is unquestionably binding on later *federal* sentencing courts. Thus, the government offers no way by which a second federal court could respond to a prior federal court's erroneous assertion of authority to determine that the two federal sentences should run consecutive to one another. Although the federal system may be one of "dual sovereignty" (BIO 6), the question presented turns on a statutory text that does not distinguish between federal and state sentences.

3. That this Court has previously denied certiorari in other cases involving the same question is no indication that "[r]esolving that conflict is unnecessary." BIO 6 & n.3. As the Solicitor General explained in each of the three cases he cites, each of those cases suffered vehicle problems that posed potentially substantial impediments to reaching the question presented: none involved an express order by the state court that the petitioner's sentence run concurrently to his federal sentence, and the petitioner in No. 04-9286, *Lackey* v. *United States*, conceded that he failed to object in the district court to the order designating his sentence as consecutive.

4. The government asserts that this case, too, presents an inadequate vehicle for resolving the division among the courts of appeals. See BIO 8-9. But the only objections the government is able to muster would apply equally to almost any

case in which the question arises and would, if accepted, permit the square circuit conflict presented by this case to forever evade review.

According to the United States, every case in which the issue is presented comes either too early or too late. Thus, the government first argues that certiorari is not warranted because petitioner's state sentence has not yet been imposed, such that it is "unclear how the state and federal sentences will interact." BIO 8-9. However, as the petition explained, the state court specified that it intends petitioner to serve a forty-eight-year concurrent sentence; if certiorari is granted and this Court adopts the rule of the Sixth and Ninth Circuits, the state court will impose that concurrent sentence and will no longer need to take any drastic steps to ensure that its sentence is carried out.

In substantial tension with its argument that certiorari is not warranted because petitioner's state sentence has not yet been imposed, the government next argues that certiorari should be denied because, even if this Court vacated the judgment below and remanded for resentencing, petitioner would be "already subject to an undischarged term of imprisonment" if he has been subsequently sentenced by the state court; as such, the district court could, on remand, then order that its sentence be served consecutively to the state term. This argument is completely speculative: as the government acknowledges, see BIO 3 n.1, petitioner has not yet been sentenced. But given the very strong likelihood that most other defendants will have been sentenced by the time this Court considers and disposes of a case, certiorari is nonetheless warranted because the question presented is "capable of repetition yet evading review." See, *e.g.*, *Olmstead* v. *L.C.*, 527 U.S. 581, 594 (1999).

The government finally suggests that certiorari is not warranted because, if this Court were to adopt petitioner's construction of Section 3584(a), it is possible that the district court on remand might impose a longer sentence – for exam-

ple, running petitioner's seven-year sentences for his Hobbs Act and Section 922(g)(1) counts consecutively instead of concurrently – to compensate for its inability to order a sentence consecutive to a future state sentence. See BIO 9-10 n.5. That, of course, will be true in almost any case in which this Court will have an opportunity to resolve the circuit split; if the Court were to wait for a case in which the district court will have no power to adjust the petitioner's sentence on remand, the important question presented here will never be resolved. In any event, if this Court resolves the question presented in petitioner's favor and the state court subsequently re-imposes the forty-eight-year concurrent sentence, even a substantially longer federal sentence (such as the twenty-one-year sentence posited by the government) would not affect the overall time served by petitioner.[1]

5. Finally, even if this Court determines that there is some doubt whether this case is an appropriate vehicle to consider the question presented, the appropriate remedy is not to deny certiorari but instead to hold the case pending this Court's consideration of the forthcoming petition for certio-

---

[1] The government contends for the first time in this Court that it is an "open question whether the state court could order its sentence to run concurrent with petitioner's seven-year sentence for the Section 924(c)(1)(A) conviction, which Section 924(c)(1)(D)(ii) requires be consecutive to any other sentence," see BIO 9 n.4 (citing *United States* v. *Gonzalez*, 520 U.S. 1, 11 (1997)). The government's contention was not only waived but is also irrelevant to the question presented – viz., whether a *federal* court can order that its sentence run consecutive to an as-yet-unimposed state sentence. Moreover, even if the state court were precluded from ordering that petitioner's sentence run concurrent with his Section 924(c)(1)(A) conviction, that court would not be precluded from ordering his sentence to run concurrent with his remaining federal counts – which represent half of his fourteen-year federal sentence. The net result of such an order, of course, would be a total sentence that was seven years shorter than it would be if the federal court's designation of petitioner's sentence as consecutive were given effect.

rari in No. 05-___, *Pierce* v. *Fleming*, CA5 No. 04-10987, 2005 U.S. App. LEXIS 22266 (Oct. 14, 2005).[2] Because counsel to the petitioner in this case also represent the petitioner in *Pierce*, the Court could efficiently grant certiorari in both cases and consolidate them for argument.

Like the petitioner in this case, the petitioner in *Pierce* entered into a state plea agreement that was contingent on his receiving a concurrent sentence, and the proper construction of Section 3584(a) was squarely presented in the courts below. Moreover, Pierce served his state sentence first before being paroled into federal custody, only then to discover that the BOP would not honor the state court's determination that his state sentence should run concurrent to the prior federal sentence. As a result, a decision in his favor would indisputably inure to his benefit. Moreover, there is no indication that the state sought to circumvent Pierce's consecutive sentence; to the contrary, when Pierce sought to have his state sentence vacated to ensure that he would receive the benefit of his plea agreement, the state judge expressly indicated that he lacked the power to modify the state sentence to circumvent the federal court's order that the state and federal sentences be served consecutively.

---

[2] The petition in *Pierce* will be filed within a day of this Reply Brief and will in addition be available on SCOTUSblog, *www.scotusblog.com*.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted. In the alternative, the Court should hold this petition pending the disposition of the petition for certiorari in *Pierce* v. *Fleming*, *supra*.

Respectfully submitted,

Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Clifford Barnard
ATTORNEY AT LAW
1790 30th Street, Suite 280
Boulder, CO 80301

Thomas C. Goldstein
Amy Howe
(Counsel of Record)
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

December 22, 2005